

231856

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SUNBELT CHLOR ALKALI PARTNERSHIP

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

and

UNION PACIFIC RAILROAD COMPANY

Defendants.

Docket No. NOR 42130

ENTERED
Office of Proceedings

FEB 16 2012

Part of
Public Record

**REPLY OF SUNBELT CHLOR ALKALI PARTNERSHIP TO
PETITION FOR SUBPOENA**

SunBelt Chlor Alkali Partnership ("SunBelt") hereby submits this reply to the "Petition for Subpoena" ("Petition") that Norfolk Southern Railway Company ("NS") filed with the Surface Transportation Board ("STB" or "Board") on January 27, 2012. NS has asked the Board to issue a subpoena to Oxy Vinyls, LP and Occidental Chemical Company (collectively "Oxy") for information regarding their ability to load and unload chlorine barges at La Porte, TX. NS claims that these records will enable NS to determine if "barge transportation of the issue movement is not a feasible alternative to rail transportation." Because SunBelt and the co-defendant, Union Pacific Railroad Company ("UP"), have made substantial progress towards reaching a settlement of their dispute that could be completed very shortly, the NS Petition to obtain discovery of a non-party to this proceeding would be rendered irrelevant and thus unwarranted.¹

¹ SunBelt and UP have reached an agreement in principle and are currently in the process of hammering out the details of a contract that will implement their agreement. Whether or not the parties are able to reach a final agreement will be known very soon. If for some reason the parties are unable to finalize their settlement, the Board

I. BACKGROUND.

By Complaint filed on July 26, 2011, SunBelt challenged the joint tariff rate of NS and UP for through transportation of chlorine from SunBelt's production facility in McIntosh, AL to Oxy in La Porte, TX. Since then, both UP and NS have replaced the challenged joint rate with separate local rates. The NS local rate applies from McIntosh, AL to New Orleans, LA and the UP local rate applies from New Orleans to La Porte, TX. Moreover, SunBelt and UP have reached an agreement in principle to resolve their dispute and are in the process of finalizing a contract for UP's transportation services. Upon execution of that contract, SunBelt will move to dismiss UP as a defendant in this proceeding and amend its Complaint to challenge just the NS local rate from McIntosh to New Orleans. Consequently, La Porte no longer would be the destination of the issue movement.

II. EVIDENCE OF GEOGRAPHIC COMPETITION IS INADMISSIBLE.

Congress has required the Board to determine "whether the rail carrier proposing the [challenged] rate has market dominance over the transportation to which the rate applies."² Here, the challenged NS local rate applies from McIntosh to New Orleans. This rate does not apply to La Porte. Accordingly, the feasibility of barging chlorine from McIntosh to La Porte is irrelevant.

Barge transportation to La Porte is geographic competition and irrelevant to the issue of market dominance. Moreover, the Board has expressly eliminated geographic competition as a factor in the market dominance analysis.³ Geographic competition concerns "whether the

already has noted that the procedural schedule in this case will need to be extended because neither SunBelt nor UP have conducted discovery of each other. See Decision served Nov. 21, 2011. Therefore, the Board can defer its decision on the NS subpoena petition until it is known whether there will be a settlement between UP and SunBelt, without the delay causing any prejudice to NS.

² 49 U.S.C. § 10707(b).

³ *Market Dominance Determinations—Product and Geographic Competition*, 3 S.T.B. 937, 950 (1998).

complaining shipper can avoid using the defendant railroad by...shipping the same product to a different destination.”⁴ NS is seeking Oxy’s barge records to show exactly this— that SunBelt can avoid NS by shipping chlorine by barge to La Porte, instead of New Orleans.

The Board squarely addressed this issue in the context of discovery in *Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Rwy. Co.*, 4 S.T.B. 64 (1998), *on reconsideration*, 4 S.T.B. 288 (1999) [hereinafter “*DMIR I*” and “*DMIR II*”]. In *DMIR*, the complainant challenged the defendant rail carrier’s rate for the transportation of coal from the interchange with BNSF at Keenan, Minnesota to a power plant at Laskin, Minnesota.⁵ BNSF transported the coal from the origin mines to the Keenan interchange pursuant to a contract.⁶ The defendant sought records regarding an alleged intermodal alternative to its rail service that involved rerouting the complainant’s traffic on BNSF to a different location than the Keenan interchange and transloading from rail-to-truck at that location for final delivery to Laskin.⁷ The Board denied defendant’s motion to compel discovery regarding this alternative because the alternative represented geographic, not intermodal, competition.⁸ In explaining its decision, the Board observed that:

The position advocated by DMIR is contrary to both our *Bottleneck* and *Product and Geographic II* decisions. Under 49 U.S.C. 10707, our market dominance inquiry is limited to whether there are effective competitive alternatives “for the transportation to which [the rate at issue] applies.” In the *Bottleneck* decisions, the Board concluded that, where there is a contract over the non-bottleneck segment of a through movement, a rate challenge must necessarily be confined to the bottleneck segment. Thus, the transportation to which the separately challengeable bottleneck-

⁴ *Id.* at 937.

⁵ *DMIR I*, 4 S.T.B. at 64.

⁶ *DMIR II*, 4 S.T.B. at 291.

⁷ *Id.*

⁸ *DMIR I* at 66; *DMIR II* at 291-92.

segment rate applies is not the full through movement (from the mines to Laskin), but rather only DMIR's movement (from Keenan to Laskin). Accordingly, under the circumstances presented here, the fact that the coal MPI receives at Laskin comes from the Montana and Wyoming mines served by BNSF is irrelevant. Because the transportation to which the rate at issue applies is limited to the movement between Keenan and Laskin, transportation alternatives involving service to or from other points would constitute geographic competition.⁹

Thus, the Board held that "evidence as to a trucking alternative from any point other than Keenan may not be considered."¹⁰

The discovery that NS seeks from Oxy is no different from the discovery request that the Board rejected in *DMIR*—NS is seeking records concerning SunBelt's ability to bypass NS by using alternative transportation to a destination other than the destination to which the NS bottleneck rate applies. Alternative intermodal transportation for the movement to which the challenged NS rate applies must originate at McIntosh and terminate at a point of interchange with the UP in New Orleans. The Board should deny the NS Petition as an impermissible attempt to obtain evidence of geographic competition, just as it denied the same type of discovery in *DMIR*. Indeed, the argument against the NS Petition is even greater in this case than it was in *DMIR*, because here NS seeks discovery of a third party rather than the actual complainant.

The *Bottleneck* decisions also compel rejecting NS's request. Those decisions established that a rate challenge cannot involve transportation to which a contract rate applies.¹¹ As restated by the Board in *DMIR II*, "the transportation to which the separately challengeable

⁹ *Id.* at 292 (footnotes omitted; underline added).

¹⁰ *Id.* at 292.

¹¹ *Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1074. ("[W]hen one of the components of service over the through route is embodied in a transportation contract, we cannot assess the reasonableness of the through rate in its entirety. . . . In a complaint against a bottleneck proportional rate that operates in combination with a contract rate, . . . we may consider only the reasonableness of the bottleneck rate.") (emphasis in original).

bottleneck-segment rate applies is not the full through movement..., but rather only [the bottleneck segment].”¹² Here, the bottleneck segment is from McIntosh to New Orleans and a contract rate applies to the segment from New Orleans to La Porte. Thus, barge transportation to La Porte is well beyond the scope of SunBelt’s rate challenge.

III. THE BOARD SHOULD DENY THE NS PETITION.

Wherefore, for the foregoing reasons, the Board should deny the NS Petition because it is directed at obtaining evidence of geographic competition, which is inadmissible in rate cases.

Respectfully submitted,



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February 16, 2012

¹² *DMIR II*, at 292.

Certificate of Service

I hereby certify that on this 16 day of February 2012, I served the foregoing Reply to Petition for Subpoena via e-mail and first class mail upon:


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